Filed 2/15/11 P. v. Omondi CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GIDEON WALTER OMONDI, Defendant and Appellant.	G043268 (Super. Ct. No. 07ZF0146) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Under the circumstances revealed in this record, no reasonable person could conclude the court exhibited judicial bias. We affirm.

I

FACTS

A jury found defendant Gideon Walter Omondi guilty of first degree murder and guilty of attempted murder. The jury found it to be true that he acted with willful premeditation and deliberation within the meaning of Penal Code section 664, subdivision (a) when he committed attempted murder. In a bifurcated sanity proceeding, the jury found defendant legally sane when he committed both crimes. The court sentenced defendant to state prison for 25 years to life, plus a consecutive sentence of life with the possibility of parole.

Defendant worked as an engineering intern at A.C.R.A. Aerospace in Anaheim while he was going through a divorce. A.C.R.A. received notification from child support services that defendant's wages were being garnished. When the company told defendant about the garnishment on Wednesday, September 6, 2006, he came back to the human resources person several times throughout the day to argue about "whether it should be enforced."

Two days after defendant was told about the garnishment, he approached the human resources person in the parking lot on Friday at 5:00 a.m. to discuss the garnishment. He sounded angry. On that day, he also went to the human resources desk several times to complain about his wages being garnished.

Two days later, Sunday, September 10, 2006, defendant walked into the Fullerton Police Department. When the officer asked if she could help him, defendant responded, "Yeah. I've killed my son." The officer asked: "What do you mean you killed your son? How old is he?" Defendant said he was four years old. He said he drowned him.

Firefighters went to defendant's home. They determined Richie Omondi was not breathing and cold to the touch. A paramedic pumped his stomach and found a large amount of fluid. The child was pronounced dead at Placentia Linda Hospital.

Meanwhile at the police station, defendant bemoaned the fact he had suffered so much: "I tried to help my son come to America so that he can gain education in America. But the system around here allows women to frustrate men. So, they've used me, they have really frustrated me, and the . . . the other day they went through Child Protective Services." Defendant said Richie was sacrificed because he was being used to make defendant's life impossible.

Defendant had been thinking about killing the boy for quite a while. He thought about poisoning him. He told the police he thought about killing his son on Friday. He said the previous January, he thought about killing him, too, when he filled two 5-gallon canisters with gasoline with the intention of pouring it on the car while he and Richie were inside. Defendant poured one can of gasoline on the car, and was in the midst of thinking about lighting a match when a police officer opened the trunk and asked why they were there. Defendant said they were in the trunk to take a nap. The officer smelled gasoline, looked for the source of the smell and could not find it, ran a check on the vehicle, which came back clear, and told defendant to leave.

II

DISCUSSION

Alleged Bias Shown by the Trial Judge

Defendant contends the trial judge's "demonstration of bias against Dr. Klatte, a key defense expert witness, denied [defendant] his right to due process and a fair trial, requiring reversal." The Attorney General responds that "[n]o reasonable jury would have understood a brief comment by the trial court about a defense expert's nonresponsiveness, as indicative of judicial bias against the expert."

During psychiatrist Ernest Klatte's testimony, the trial court sustained numerous nonresponsive objections by the prosecutor, and struck all or part of several of the witness's answers. At sidebar, the judge remarked: "The problem with Dr. Klatte's testimony is rather self-evident. He's asked what time it is, and he wants to explain how to make a watch. He'll give a responsive answer then start into a dissertation which he throws in a lot of otherwise inadmissible material." The court requested of defense counsel: "So if we can try to rein him in, perhaps, so that he's only responding to the question and not saying everything that he would like to say."

At one point, after defense counsel asked a question which called for a yes or no response, Klatte's response took the better part of two pages of the court reporter's transcription. At the end of the response, defense counsel stated: "That wasn't the question, doctor. Would you give me your word that if there is a question that I ask that's unclear, please tell me it's unclear."

After Klatte apologized, the following took place: Defense counsel: "Can I just note for the record that during the doctor's response the D.A. threw his pen down and made kind of a mockery of the doctor by looking over at the jury and kind of mocking him." [¶] The court: "I didn't see that, but I'll take your word for it." [¶] The prosecutor: "I'll stipulate I threw my pen down. How's that?" The court then asked Juror No. 14 if there was a question. [¶] Juror No. 14: "I believe the prosecutor tried to stop him as far as to object or ask a motion on your part, and I never heard you respond to it." [¶] The court: "That's because I wait for that magic word, 'objection.' If it's not said, I don't rule on it." [¶] Juror No. 14: "Okay." [¶] The court: "It was not said." [¶] Juror No. 14: "Okay." [¶] The prosecutor: "Agreed."

During the examination of another defense expert, Martha Rogers, the following questions and answers were made by defense counsel and Dr. Rogers: Q: "We had Dr. Klatte in yesterday. Are you familiar with Dr. Klatte?" [¶] A: "I am." [¶] Q:

"In fact, you consider him a friend?" [¶] A: "When I started in 1983, Dr. Klatte was the grand old man of the expert witness panel, and he still is."

Later in Rogers's testimony, a prosecution nonresponsive objection was sustained. Immediately afterward, the following questions, answers and comments were made by defense counsel, Rogers, the court and a juror: Q: "Are there any other factors or bases for your opinion that he understood the nature and quality of his actions on September 10, 2006?" [¶] A: "I made a long list of them, but if I can't do a narrative, I don't know how to do this. You'll have to guide me." [¶] The court: "I will take that as a yes, then." [¶] A: "Yes, there are other factors." [¶] The court: "And I'm not picking on you, Dr. Rogers. We had the grand old man in yesterday, and it was quite an ordeal." [¶] A: "I'm so sorry. Poor Ernie." [¶] The court: "Poor Ernie?" [¶] Juror No. 13: "That could be debated." Defense counsel then proceeded with his direct examination.

Outside the presence of the jury, the following was said: Defense counsel: "I will preface my comments by saying I don't think the court was commenting on the evidence as provided by Dr. Klatte, but I'm not sure by you suggesting to the jury what you did right before the break doesn't communicate to them that somehow he's a fool and really shouldn't be believed. I'm just concerned when you do something like that, particularly given the incident yesterday with the district attorney, it just — I really object to you doing that. I think it sends the wrong signal to the jury. [¶] I guess I would ask you to somehow clarify for them what you were doing. I'm not even sure exactly what you were doing. I think you were just trying to be lighthearted, I'm guessing. Unfortunately, it's at the expense of one of our critical witnesses. And I'm concerned that the jury is going to misinterpret what you were doing."

The court responded: "I don't think that any reasonable person could interpret my comments as anything other than Dr. Klatte was numerous times unresponsive to the questions, which was borne out by the record. In no way could that

possibly be construed as impugning his integrity or challenging his opinion; merely commenting on his lack of responsiveness. [¶] I'm not going to admonish the jury."

The standard for judicial bias is whether a reasonable person would doubt the court's impartiality. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 262.) Whether or not judicial misconduct has occurred is evaluated on a case-by-case basis. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 770.)

"'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.' [Citations.]" (*People v. McKenzie* (1983) 34 Cal.3d 616, 626.) "The standards of conduct to which judges are held are reflected in part in the canons of the Code of Judicial Conduct. Although these canons do not have the force of law or regulation, 'they reflect a judicial consensus regarding appropriate behavior' for California judges. [Citations.] The failure of a judge to comply with the canons 'suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.' [Citation.]" (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 661-662.) Canon 3B(4) states, "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all court staff and personnel under the judge's direction and control." (Cal. Code Jud. Ethics, canon 3B(4).)

The record reflects the court here was always patient, dignified and courteous to litigants, jurors, witnesses and lawyers. We agree with the trial judge that a reasonable person could not interpret the court's comments as anything other than stating what is obvious from the record. Nor could a reasonable person doubt the court's impartiality in light of this record. In fact, the court made the statements in an obvious attempt at courtesy extended to Dr. Rogers.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.